United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

To Be Argued By
JAY GOLDBERG

B
P/J

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2015

WILLIE ABRAHAM,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT

This is an appeal from an Order entered on July 5, 1974, in the United States District Court, Southern District of New York (Knapp, USDJ) dismissing, without a hearing, appellant's petition made pursuant to 28 USC 2255 to vacate his 1963 federal narcotic conviction. The 1963 conviction was before the Hon. John F. X. McGohey, USDJ, and assigned to Judge Knapp as his successor.

Petitioner completed service of his sentence on the said conviction prior to the commencement of this

action. He is presently serving a life sentence imposed pursuant to 21 USC 848 by Judge Van Pelt Bryan in 1973 following a later narcotics conviction by a jury.

THE FACTS

On February 22, 1974, appellant instituted this action to vacate his 1963 conviction (62 Cr. 949) achieved by his guilty plea, contending that when the plea was accepted he was: (1) not informed by the Court, counsel or anyone else of his ineligibility for parole; and (2) not aware of a possible defense to the indictment. The petition was supported by an affidavit from his then attorney, a memorandum of law and a copy of the proceedings in the trial court in 1963.

The Government's answering affidavit stated that it did not oppose an evidentiary hearing on the claims (29a). At oral argument the "government conceded that petitioner had adequately demonstrated the necessity for an evidentiary hearing to determine the truth of petitioner's allegations." (31a)

After oral argument, on May 30, 1974, Judge Knapp sent counsel for both sides a "draft opinion" and invited "comments and criticisms." In the draft opinion the Court stated that:

> "While we grant that Judge Bryan probably considered the facts underlying the instant conviction in deciding to sentence petitioner to a life term such consideration was simply one to be weighed by him in his discretion along with a host of other matters."

The draft opinion reasoned that since appellant was no longer serving his sentence under the challenged 1963 judgment, 2255 relief was inappropriate and a Rule 35 motion before Judge Van Pelt Bryan (who sentenced appellant in 1973) would be the appropriate way to attack the 1963 conviction.

In response to the draft opinion, petitioner's counsel wrote to the Court on June 6, 1974, and requested the Court to treat the petition as in the nature of one seeking coram nobis relief. Counsel pointed to the Court's concession made in the draft opinion that the 1963 conviction had collateral consequences to the extent it stated that Judge Bryan "probably considered" the 1963

conviction in imposing the 1973 life term. Counsel pointed, as well, to the fact that parole authorities would consider the 1963 conviction as an adverse circumstance weighing against appellant's possibility of parole.

On July 2, 1974, the Court issued its opinion omitting any reference earlier made in its draft as to the probable consequences of the 1963 challenged conviction on the 1973 sentence imposed by Judge Van Pelt Bryan and suggested further that the issue of the propriety of the 1963 judgment might best be made not before that trial Court, but before Judge Bryan.

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE CASE REMANDED FOR A FACTUAL HEARING

Though originally styled as a petition seeking relief under 28 USC 2255 appellant's counsel, in writing, on June 6, 1974, requested the Court to deem the pleading as one seeking coram nobis relief. The Court should have done so. See, in particular, Simons v. United States,

497 F.2d 1046, 1048-49 (9th Cir., 1974).

It is quite true that while the remedy under Title 28 USC 2225 is not available when the sentence sought to be set aside has been fully served, "a petition thereunder may be treated as an application for a writ of error coram nobis." Fee v. United States, 207 F.S. 674 (WD, Va. 1962).

It has been said that a motion in the nature of coram nobis is "of the same general character as one under 28 USC 2255." See United States v. Morgan, 346 U.S. 502 at 506; and, generally Wright, Federal Practice and Procedure, Criminal Section 592 "Relation to Coram Nobis."

In deciding whether to grant the post conviction relief under 2255 with respect to a sentence already served, the critical issues are whether the claimed denial of the right is of a "fundamental character" /United States v. Morgan, 202 F.2d 67 at 69 (2d Cir. 1953)/, and whether "the results of the conviction may persist." United States v. Morgan, 346 U.S. 502 (1953). Where there was a dispute about the issue of collateral consequences from an erroneous judgment the learned Court in Angelini v.

United States, 322 F.S. 699 (ND, Ill. 1970) held that regardless of whether there be collateral consequences the essential point is a defendant is entitled to have a fundamentally erroneous and improper judgment, violative of constitutional rights, vacated.

The claimed denial in the case at bar is of a fundamental character. Appellant claims that he waived his right to proceed to trial and pleaded guilty involuntarily in a constitutional sense. That is, he claims that his plea was involuntary in that he lacked the knowledge necessary for an intelligent waiver of his rights and his ignorance actually contributed to his decision to plead guilty. See Grant v. United States, 451 F.2d 931 (2d Cir. 1971); Aiken v. United States, 358 F.S. 87 (SDNY 1972). Denial of the application without a hearing requires that "all factual assertions on the affidavit submitted on behalf of (appellant) must be assumed to be correct." United States v. Magiello, 434 F.2d 33, 34 (2d Cir. 1970). (The memorandum of law in support of the petition is reproduced at 11a-16a.) The Government conceded the need for an evidentiary hearing.

The results of the erroneous judgment persists. In the draft opinion sent counsel on May 30, 1974, the trial Court conceded that "Judge Bryan probably considered the facts underlying the instant conviction in deciding to sentence petitioner to a life term..." A factual hearing will determine that the parole authorities would clearly consider the prior 1963 conviction as an adverse circumstance weighing against appellant's parole on his 1973 conviction. The Supreme Court has clearly indicated a liberal view as to the possibilities of there being collateral consequences from erroneous convictions, marking a sharp departure from its earlier strict application of the doctrine of "mootness." Carafas v. LaVallee, 391 U. S. 234 (1968); Sibron v. New York, 392 U.S. 40 (1968).

It simply makes no sense, it is respectfully submitted, for the Court which imposed the challenged conviction not to be the tribunal which ought to review the propriety of it and to suggest instead to counsel that a different tribunal (i.e. Judge Bryan) should determine the contested issues.

A hearing which the Government conceded should be

held ought to be held before the Court which imposed the 1963 sentence at which time the trial Court may not only consider the question of whether appellant's plea was involuntary or not, but whether he has sufficiently demonstrated collateral consequences from the erroneous judgment.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE CASE REMANDED FOR A FACTUAL HEARING.

Respectfully submitted,

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